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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROL A. ELEWSKI,

Petitioner,

—vs.—

CITY OF SYRACUSE, and ROY BERNARDI,
in his official capacity as Mayor of the City of Syracuse,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *County of Allegheny v. ACLU* require a court passing on a municipally sponsored religious display to look only to the display's immediate physical environs or may it consider physically unrelated displays and events throughout the jurisdiction?

2. Should the judgement below be vacated because the plaintiff in this action for injunctive relief moved out of the jurisdiction while the appeal was pending?

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No. 97-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CAROL A. ELEWSKI,

Petitioner,

vs.

CITY OF SYRACUSE, and ROY BERNARDI, in his official capacity as Mayor of the City of Syracuse,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Carol Elewski respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-30a) is reported at 123 F.3d 51 (1997). The opinion of the district court (App. 1b-25b) is unreported. The order of the court of appeals denying the Peitition for Rehearing and Rehearing *En Banc* (App. C) is not yet reported.

JURISDICTION

The decision of the court of appeals was entered on July 31, 1997. A Petition for Rehearing and Rehearing *En Banc* was denied on October 2, 1997. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion ...."

STATEMENT OF THE CASE

1. The City of Syracuse annually sponsors a creche in Clinton Square, a downtown public park. The creche is largely identical to that in *County of Allegheny v. ACLU*, 466 U.S. 668 (1989). It consists of figures of Jesus, Mary, Joseph, a shepherd, donkey, lamb, and angel. The figures are arranged to depict the birth of Jesus, under a banner proclaiming "Gloria In Excelsis Deo." The creche stood on a 10' by 8' platform, and fronted a major downtown street.

2. The creche is not surrounded by any secular symbols such as Santa Claus or reindeer which form a unified whole with the creche. However, the creche was placed in front of a 50 foot high Christmas tree.
3. The city-owned creche was erected by public employees at an estimated annual cost of $396.00.
4. The City erected seasonal displays at other sites downtown, all of which were remote from the creche and separated from it both by distance and numerous buildings. The location of the displays is shown on a City map. [Appendix E.]
5. The City decorates downtown lamp-posts with "greenery, wreaths and colored lights." In Hanover Square, 200 feet distant from the creche, wire bells decorated with greenery and lights, a lighted Christmas tree, a snowman and reindeer are displayed.
6. Still farther from the creche (300 feet away) on the same square, but back from the street, a Jewish organization sponsors a menorah, which City employees erect.
7. Carol Elewski was a taxpaying resident of Syracuse who objected to the City's sponsorship of the creche. She took steps to avoid the Clinton Square area where it was displayed. When the City rejected her demand that it end sponsorship of the creche, she filed suit, seeking declaratory and injunctive relief,

counsel fees, and such other relief as the Court deemed proper.

8. The District Court rejected a request for a temporary restraining order. Pursuant to Rule 65 (a), a hearing on a motion for a preliminary injunction and trial on the merits were combined. The District Court found no constitutional violation. [Appendix B.]

9. The Court found that Elewski had standing to challenge the creche because (a) she avoided Clinton Square while it was displayed; (b) Elewski was marginalized by the Syracuse's use of a Christian religious symbol to bring the community together; and (c) the display was paid for from tax funds.

10. The District Court upheld the city's sponsorship of the creche under the "endorsement" test of *County of Allegheny*, *supra*, and the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Comparing the creche before it to the religious symbols at issue in *County of Allegheny*, the court found that Syracuse's creche was "factually more analogous to the menorah" than to the display held unconstitutional in *County of Allegheny*.

11. The District Court found no evidence that the City's creche was intended to convey a religious message. It found that *Lynch v. Donnelly*, 465 U.S. 688 (1984) mandated a focus on the holiday season, not the immediate physical context of the display:

> Like the creche in *Lynch*, the creche in this case must be considered in view of the City's extensive holiday decorations which include a menorah just a few hundred feet away in a neighboring park, and various non-religious decorations throughout the downtown area including wreaths, bells, lights, reindeer and a snowman. Like the menorah display in *County of Allegheny*, the creche in this case is not dominant in the City's overall holiday decorations, but is actually dwarfed by a huge, brightly lit Christmas tree, a widely recognized secular symbol of the holiday season.

[18b-19b]

12. The Court reached the same result under the tripartite test of *Lemon v. Kurtzman*, *supra*. As to the effects branch of the test, the Court found that the whole city was the proper context against with to evaluate the constiutionality of the creche:

> [T]he creche in this case satisfies the second prong of the *Lemon* test because it cannot be viewed as a government "endorsement" of Christianity when viewed in the context of the City's decorations in Clinton Square and throughout the downtown area. Like the menorah in *County of Allegheny*, the creche in this case

> stands at the base of a fifty-five foot Christmas tree and can only be viewed from one angle. There are also numerous religious and non-religious decorations less than one hundred yards away in Hanover Square, including wreaths, reindeer, a snowman and the menorah. .... [U]nlike the creche in *County of Allegheny* ... the creche in this case is located in a public park, not the main entrance of a government building.

[20b-21b]

13. The court attached no significance to the fact that the creche in *County of Allegheny* was privately sponsored and Syracuse's officially sponsored.

14. The Court of Appeals affirmed. The heart of its affirmance was its conclusion that because it was part of a larger seasonal display, sponsorship of the display did not endorse Christianity. That Court also rejected Elewski's claim that "the creche here is an isolated display and that the menorah and secular symbols in Hanover Square were not part of the relevant context for the creche." It wrote:

> To get to either Clinton or Hanover Square, one has to use streets with lampposts decorated with artificial greenery, wreaths, and colored lights. The squares themselves are across the street from each

> other.[1] A reasonable observer traveling on Salinas Street would thus observe decorated lamp-posts, lights, decorated trees, reindeer, a snowman, and wire bells. As the traveler approached the intersection of Salinas and Water Streets, the creche would be visible on the right and the menorah would become visible on the left. A photograph in the record indicates that a traveler on Water Street approaching the intersection would have both the creche/holiday tree exhibition and the menorah in view. The menorah is thus on the same street as the creche/holiday tree but in the next block.

[9a-10a]

15. Judge Cabranes' dissent took issue with the majority's insistence that the creche should be judged together with displays elsewhere in the City:

> [A] reasonable observer would view the creche, together with the Christmas tree, as a separate, clearly demarcated exhibit, distinct from any of the other holiday

---

1. The court of appeals' opinion should not be understood as meaning that the creche and Menorah were directly across a street from one another. Rather, they were 200 feet apart along a main throughfare. The City's own map [Appendix E] shows two cross streets between the creche and menorah.

> displays in the downtown area, and in a prominent position clearly indicating sponsorship by the City of Syracuse. In viewing the relevant holiday display as consisting of the entire downtown area, the majority disregards the only explicit Supreme Court teaching addressing how broadly we ought to delineate or define the display under review, for purposes of the endorsement test. In ... *Allegheny*, the Court pointedly noted that:
>
> > [t]he presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

[22a-23a]

16. Moreover, although the majority had not relied on the adjoining Christmas tree as a secularizing element, Judge Cabranes found that it did not serve that function in this case:

> [T]he message of pluralism that the Supreme Court believed was conveyed by the menorah/Christmas tree display, *id.* at 635 (O'Connor, J., concurring), and its secular context, *id.* at 613-21 (Blackmun, J., concurring) .... It is this distinction—this reliance on a secular context and a message of pluralism—that enabled the menorah/Christmas tree display in *Allegheny* to survive constitutional scrutiny, notwithstanding the fact that the City of Pittsburgh subsidized the display.
>
> Here ... it seems to me difficult to argue that the creche/Christmas tree display is "stress[ing] the theme of liberty and pluralism." To the contrary, the creche appears clearly to suggest the City's endorsement of Christianity. The creche is placed in Syracuse's main downtown park; it is situated at the foot of the City's enormous Christmas tree; and it is surrounded by City barricades bearing the name of the mayor of Syracuse and a municipal government agency. Furthermore, as in the creche display held unconstitutional in *Allegheny*, the creche display here has a banner with the words "Gloria in Excelsis Deo"—words that the

> Supreme Court in *Allegheny* found to convey an unequivocally sectarian message.

(citations and footnote omitted). [22a-23a]

17. During the pendency of the appeal, Elewski moved from Syracuse to Alabama, where she currently resides. She notified the Court of Appeals clerk's office of the change when the case was submitted for decision. [Appendix D.]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ADOPTS THE DISSENT IN *COUNTY OF ALLEGHENY V. ACLU*

The decision of the Second Circuit follows exactly the rule for judging religious holiday displays proposed by the *County of Allegheny* dissent. It is in flat opposition to the rule enunciated by the majority in that case. Because the Court of Appeals acted contrary to the exact holding of this Court, on a point which was hotly contested and resolved in this Court, a writ for certiorari should issue.

The precise issue which divided the majority and dissenters in *County of Allegheny* was whether seasonal religious displays should be judged in a "particular physical setting," 492 U.S. at 595 (Blackmun, J.), or whether the "relevant context is not the items in the display itself, but the season as a whole." 492 U.S. at 666 (Kennedy,J., dissenting).

The *County of Allegheny* majority emphasized and reemphasized that the "physical context" against which the constitutionality of a religious symbol would be decided was the immediate physical environs of the religious symbol. See 492 U.S. at 586-811, 594 (interpreting *Lynch v. Donnelly*, 465 U.S. 668 (1984)); 596-97 ("our present task is to determine whether the display of the creche and the menorah in their respective 'particular physical settings has the effect of endorsing ... religio[n] ...'"); 598, and *id.* at n. 48 ("the presence of Santas or other Christmas decorations elsewhere in the ... Courthouse ... fail to negate the endorsement effect of the creche."); 608; 612.

In explaining why a menorah could displayed together with a Christmas tree, this Court emphasized the immediate physical context of the menorah, 492 U.S. at 615-18. Although the courthouse where the creche was displayed and the city-county building outside of which the menorah was displayed were physically closer than the creche and menorah at issue here—only a city block apart—they were treated as separate and distinct displays throughout the opinion. Indeed, not even the *County of Allegheny* dissent suggested that one display was relevant to the constitutionality of the other.

The concurring opinion of Justice O'Connor and the concurring and dissenting opinions of Justices Brennan, Marshall and Stevens ratified the majority's focus on the discrete physical context of a display. 492 U.S. at 624-27

(O'Connor, J.); *id.* at 641-42 (Brennan,J.); *id* at 653 (Stevens, J.).

The dissent also understood the majority opinion this way, taking direct and repeated aim on the majority's focus on immediate physical context. Justice Kennedy insisted that the majority distorted and ignored the *Lynch*'s emphasis on the holiday season as the appropriate context, 492 U.S. at 666, 674. It belittled the decision of cases by "intuition and tape measure." *Id.* at 675.

Even if it were open to the lower courts to pick and choose among majority and dissenting opinions of this Court, the Second Circuit's opinion would nonetheless merit review because its holding conflicts with the holding of every court of appeals and state court which has applied *County of Allegheny* to a religious symbol. Thus, the Third,[2] Fourth,[3] Fifth,[4] Sixth[5], Seventh[6] and Ninth[7] Circuits

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2. *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997).

3. *Smith v. County of Albermarle*, 895 F.2d 953, 956 (4th Cir. 1990).

4. *Murray v. City of Austin*, 947 F.2d 147, 155-57 (5th Cir. 1991).

5. *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990); *ACLU v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990); *Cf.*, *Coles v. Cleveland Bd. of Educ.*, 950 F.Supp. 1337 (N.D. Ohio 1996).

(continued...)

have read *County of Allegheny* to require a focus on the immediate physical context. Indeed until this case, so had the Second Circuit. *Chabad Lubavitch v. City of Burlington*, 936 F.2d 101, 111 (2d Cir. 1991).

State courts which have passed on the issue have likewise focused on the immediate context of a religious display, not displays spread over an entire urban area or the holiday season. *Colorado v. Freedom from Religious Foundations*, 898 P.2d 1013, 1022-23 (1995); id. at 1038-40 (dissenting opinion); *King v. Village of Waunakee*, 185 Wisc.2d 25, 517 N.W.2d 617 (1994).

The decision below thus unsettles what this Court settled in *County of Allegheny*. In order to maintain consistency in the law, and to prevent a recurrence of the confusion which prevailed between the decision in *Lynch* and the decision in *County of Allegheny*, a writ of certiorari should issue.

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6. (...continued)

6. *Gonzales v. North Twshp., Lake County*, 4 F.3d 1412, 1413-14 (7th Cir. 1993); *Grossbaum v. Indianapolis-Marion Bldg. Authority*, 63 F.3d 581, 591 (7th Cir. 1995), citing *AJCongress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987).

7. *Kreisner v. City of San Diego*, 988 F.2d 883, 888 (9th Cir. 1993).

II. IF PETITIONER HAS NO STANDING BECAUSE SHE NO LONGER LIVES IN SYRACUSE, THE COURT BELOW LACKED JURISDICTION AND THE JUDGMENT SHOULD BE VACATED

During the pendency of the appeal to the Court of Appeals, petitioner Elewski moved from Syracuse to Alabama. She promptly notified the Office of the Clerk of the Second Circuit of her move [Appendix D.] Notwithstanding that her move cast substantial doubt on her standing to pursue this case, in which the primary relief sought was injunctive[8], that Court decided this case on the merits.

If Elewski nevertheless had standing in the Court of Appeals, she retains it here. If she lacks standing now, she lacked it in the Court of Appeals. Either way, the judgment below cannot stand. If Elewski had and has standing, the judgment below is inconsistent with *County of Allegheny*. If on the other hand, Elewski lacked and lacks standing, the court below was without jurisdiction to decide this case, and its judgement cannot stand.

---

8. Elewski also sought such other relief as was just and proper. Such a prayer apparently does not suffice to save a case from dismissal for want of a case or controversy where the party lacks standing to seek the relief specifically sought in the complaint. *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997).

Standing is an essential element of a "case and controversy," *Diamond v. Charles*, 476 U.S. 54, 62 (1986), and must continue during the entire pendency of litigation, including appeal, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067 (1997); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). Where a party loses standing during the pendency of an appeal, or where the lack of standing becomes apparent only in this Court, the appropriate course is to vacate the judgment below. *Arizonans for Official English*, *supra*, 117 S.Ct at 1072; *Iron Arrow Society*, *supra*, 464 U.S. at 72-73. That should be done here, if Elewski's move from Syracuse deprived her of standing.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgement of the Court below, and the case should be set for plenary review. In the alternative, the writ should be granted, the judgement vacated, and the

case remanded for an order of dismissal for want of a case or controversy.

Respectfully submitted,

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December 24, 1997

APPENDIX A

APPENDIX A

Decision of U.S. Court of Appeals
for the Second Circuit

No. 2061, Docket 96-7227

UNITED STATES COURT OF APPEALS
Second Circuit

CAROL A. ELEWSKI,
Plaintiff Appellant,

v.

CITY OF SYRACUSE; ROY BERNARDI, in his official capacity as Mayor of the City of Syracuse,
Defendants-Appellees.

Submitted September 20, 1996

Decided July 31, 1997

Resident brought § 1983 action seeking declaratory and injunctive relief against city's display of creche

during winter holiday season. The United States District Court for the Northern District of New York, Frederick J. Scullin, Jr., J., 1996 WL 31169, entered judgment against resident, and she appealed. The Court of Appeals, Winter, Chief Judge, held that city's display of creche did not violate First Amendment.

Affirmed.

*****

Jose A. Cabranes, Circuit Judge, filed dissenting opinion.

*****

Carol A. Elewski, Syracuse, NY, *pro se*.

Joseph E. Lamendola, Corporation Counsel (Lisa DiPoala-Haber, of counsel), Syracuse, NY, for Defendants-Appellees.

Before: WINTER, Chief Judge, MESKILL and CABRANES, Circuit Judges.

*****

WINTER, Chief Judge:

Carol A. Elewski, an atheist and resident of the City of Syracuse, brought this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the display of a creche by the City in a downtown public park. Having denied Elewski's application for a preliminary injunction, the district court held a consolidated hearing on the merits pursuant to Rule

65(a)(2), Fed.R.Civ.P., and entered judgment against her. We affirm.

BACKGROUND

During the 1996 winter holiday season, as in past years, the City erected and displayed a creche (or nativity scene) in Clinton Square, a public park in downtown Syracuse. The origins of the creche are unclear, perhaps because of its age. Indeed, the record does not even establish when it was first displayed, the earliest possible date being 1913. However, it is clear that the City owns it. As displayed in Clinton Square in 1995, the creche faced Salina Street, a major downtown thoroughfare, and rested on an approximately ten-foot by eight-foot wooden platform raised about two feet above sidewalk level. Included in the crèche were statues representing Jesus, Mary, and Joseph, a shepherd, a donkey, a lamb, and an angel suspended over the other figures and bearing a banner reading "Gloria in Excelsis Deo" ("Glory to God in the Highest"). At the City's expense, the creche wast by two forty-watt spotlights. It is erected and taken down each year by City employees using City equipment. During the past winter holiday season, three city employees performed these tasks at a cost of $396.00.

The creche is located at the foot of a fifty-five foot evergreen tree decorated with colored lights and a star at the top. The creche and the holiday evergreen tree were at the corner of Salina and Water Streets and were

surrounded by sawhorse barricades with red lettering reading "SPECIAL EVENTS" and "ROY A BERNARDI MAYOR" with "DPW" on the slats. The City pays for the transport, erection, illumination, and dismantling of the tree.

Also at its expense, the City decorates other parts of downtown Syracuse with secular symbols during the winter holiday season. Lampposts, including those on Salina and Water Streets, are adorned with greenery, wreaths, and colored lights. Another area the City decorates is Hanover Square, which is located on the other side of Water Street and in the next block approximately 200 feet from Clinton Square. The City's decorations in Hanover Square consist of twelve wire bells with artificial greenery and lights, an evergreen tree with colored lights and a star, a snowman and a reindeer, both made up of lights and wire.

Hanover Square is also the site of a menorah owned by Chabad Lubavitch, a private religious organization. The menorah, located approximately 300 feet from the creche, is displayed during a portion of the same period of time in which the City displays holiday decorations in the downtown area. Chabad Lubavitch applied for (and was granted) a permit to place the menorah. A sign posted on the menorah reads:

THE LIGHTS OF THE MENORAH
COMMEMORATE THE MIRACLE OF
CHANUKAH--THE FREEDOM OF

THE HUMAN SPIRIT.
FREEDOM FROM TYRANNY AND
OPPRESSION
THE VICTORY OF LIGHT OVER
DARKNESS
HAPPY CHANUKAH
CHABAD LUBAVITCH
424-0363

Chabad Lubavitch is assisted by City workers in erecting, dismantling, and lighting the menorah. It is blued by the City for partial reimbursement of the City's costs. Last season, that bin was for $267.68. However, the City bore some $460 of costs for providing fire department personnel during the lighting ceremony.

Ronald Jennings, Commissioner of Parks, Recreation, and Youth Programs, testified about the decorations and a number of events such as story-telling that the City sponsors during the winter holiday season, including the display of the menorah. Asserting the City's openness to different religions, he further testified that "[i]f a request is made and is reasonable, we try to accommodate it." As to the timing and purpose of the City's activities, the commissioner stated that the City's celebration began earlier than usual, on November 24, 1995 (the day after Thanksgiving) rather than the first Friday in December, in response to requests from merchants that the downtown holiday season begin at the same time as at the suburban

shopping malls. He testified that the purpose of the holiday decorations was to bring the community together to celebrate the holiday season and to promote business in the downtown area. He also testified that the various holiday decorations are determined by the City and not by any religious organization.

The only other witness who testified at the hearing was Roy A. Bernardi, Mayor of the City. The Mayor agreed with Commissioner Jennings that in addition to bringing the community together for the holidays, the purpose of the various decorations was to promote downtown business. The Mayor also stated that the business community had lobbied for the early beginning to the holiday ceremonies.

Finding that the creche was not a religious endorsement in light of its overall setting and that the various decorations had a secular purpose, the district court found no Establishment Clause violation. *Elewski v. City of Syracuse*, 96-CV-1830 (FJS), 1996 WL 31169 (N.D.N.Y. Jan.19, 1996).

DISCUSSION

Neither Elewski nor the City disputes that the district court's findings of adjudicative fact are subject to reversal only if clearly erroneous, Fed.R.Civ.P. 52, and that *de novo* review is appropriate for conclusions of law or mixed fact and law. *United States v. Moore*, 968 F.2d 216, 221 (2d Cir. 1992).

Establishment Clause caselaw applies a highly fact-specific test to government-sponsored creches: Would a reasonable observer of the display in its particular context perceive a message of governmental endorsement or sponsorship of religion? *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 673, 693-94, 699-600 (1989); *Lynch v. Donnelly*, 466 U.S. 668, 690, 693-94, 104 S.Ct. 1355, 1368, 1369-70, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); see also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 763 (1995); *Creatore v. Town of Trumbull*, 68 F.3d 59, 61 (2d Cir.1995); *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109, 111 (2d Cir.1991) (*per curiam*), cert. denied, 505 U.S. 1218 112 (1992); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir.1989), cert. denied, 496 U.S. 926 (1990). The question of whether a reasonable viewer would perceive a message of endorsement of religion from a government-sponsored creche is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (opinion of O'Connor, J.).

We have noted that the outcome-determinative opinions of Justices O'Connor and Souter in Capitol Square should guide us, and that "'the endorsement test necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in

which the religious display appears.'" *Creatore*, 68 F.3d at 61 (quoting *Capitol Square*, 515 U.S. at _____, _____, 115 S.Ct. at 2452, 2455 (O'Connor, J., concurring in part and concurring in the judgment)).

After *Allegheny* and *Lynch*, therefore, not every city-owned-and/or-displayed creche violates the Establishment Clause. *Lynch* squarely upheld a city's erection of a creche that it owned as part of its Christmas display in a park owned by a nonprofit organization. *Lynch*, 465 U.S. at 671. A key factor leading to that conclusion, especially in light of the later *Allegheny* decision, was that the creche was only a small part of an otherwise secular display. *Allegheny*, 492 U.S. at 598; *Lynch*, 465 U.S. at 671, 688.

In *Allegheny*, however, the Court struck down a stand-alone creche on the central staircase of a courthouse. 492 U.S. at 598-602. The creche had been erected by a religious organization with a plaque indicating its sponsor. By contrast, in the same case, the Supreme Court upheld the display of a privately owned menorah. The menorah was stored, erected, and removed at City expense each year. *Id.* at 587 (opinion of Blackmun, J.). It was displayed next to the City-County Building and City's Christmas tree at the foot of which was a sign bearing the mayor's name.[1] *Id.*

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1. The sign was entitled "Salute to Liberty" and read: "During this holiday season, the city of Pittsburgh salutes

at 581-82, 613-21 (opinion of Blackmun, J.); *id.* at 632-37 (opinion of O'Connor, J.); *id.* at 655 (opinion of Kennedy, J. joined by Rehnquist, C.J., White, J., and Scalia, J.).

Although *Allegheny* dealt in large part with governmental favoring of private religious speech through a private creche and Lynch concerned public expression through a publicly sponsored creche, in either situation the test is whether a message of endorsement would be perceived by a reasonable observer. *Capitol Square*, 515 U.S. at _____, _____, 115 S.Ct. at 2447-48. Thus, if a creche's context—like the context of the creche in *Lynch* or that of the menorah in *Allegheny*—neutralizes the message of governmental endorsement, then the creche passes muster under the Establishment Clause.

Elewski argues that the creche here is an isolated display and that the menorah and secular symbols in Hanover Square are not part of the relevant context. We disagree. A reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the creche. To get to either Clinton or Hanover Square, one has to use streets with lampposts decorated with artificial greenery, wreaths, and colored

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liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom." *Allegheny*, 492 U.S. at 582.

lights. The squares themselves are across the street from each other. A reasonable observer traveling on Salina Street would thus observe decorated lampposts, lights, decorated trees, reindeer, a snowman, and wire bells. As the traveler approached the intersection of Salina and Water Streets, the creche would be visible on the right and the menorah would become visible on the left. A photograph in the record indicates that a traveler on Water Street approaching the intersection would have both the creche/holiday tree exhibition and the menorah in view. The menorah is thus on the same street as the creche/holiday tree but in the next block.

A reasonable observer would also know that downtown Syracuse merchants encourage the holiday display, including its earlier than usual erection in 1995, to attract shoppers to the downtown area and away from suburban malls. Finally, a reasonable observer would be aware that the City actively attempts to accommodate all groups' reasonable requests for additional displays and events during the holiday season.

We therefore agree with the district court that a reasonable observer would not perceive the creche as a message of endorsement of Christianity. Such an observer would perceive a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season, and that a principal purpose of that celebration was to preserve the

economic viability of downtown retailers. We therefore find no impermissible effect resulting from the display of the creche in the setting described.

However, in addition to not having a primary effect of advancing or inhibiting religion, a statute or practice must not foster an excessive entanglement with religion and must have a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Elewski makes no claim of excessive entanglement. The district court found a secular purpose for the creche as part of the entire display, and this finding is not clearly erroneous. The court credited evidence of a desire to bring the community together and to promote business. The creche, by representing one of the origins of the holiday season, contributed to those goals. *Elewski*, 1996 WL 31169 at *7. We agree.

Turning from the general display of the creche to its funding compared with that of the menorah, Elewski contends that full funding of the creche while requiring partial reimbursement in the case of the menorah is discriminatory and should be subject to the strict scrutiny standard of *Larson v. Valente*, 456 U.S. 228 (1982). Whether Elewski has standing to raise this issue is anything but clear, but we see no cognizable discrimination. The funding of the creche, while covering all costs, was less than the cost to the City of having the menorah erected and lit. The fiscal solution reached was a reasonable accommodation in a situation

in which the creche was publicly owned while the menorah was erected by a private group that openly sponsored the display.

Finally, Elewski contends that the barricades with the mayor's name and "SPECIAL EVENTS" painted on them have the effect of endorsing the religious message of the creche. We disagree. A reasonable observer would perceive the sawhorse barricades as entirely functional and not communicative of a message of religious endorsement.

CONCLUSION

We therefore affirm.

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JOSE A. CABRANES, Circuit Judge, dissenting:

Creche cases are a familiar fixture of the holiday season, and the courts have often revisited the central question they present: When does a display of religious symbols rise to the level of "endorsement" of religion in violation of the Establishment Clause of the First Amendment?[2] I agree with the majority that we must

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2. The Establishment Clause of the First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion ...." U.S. CONST. amend. I. By incorporation in the Fourteenth Amendment, the Establishment Clause also applies to state and local

address this question through the eyes of a "reasonable observer." See *Creatore v. Town* of Trumbull, 68 F.3d 59, 61 (2d Cir.1995) (*per curiam*). But in applying that legal rifle to the facts of this particular case, I believe we are also compelled by binding precedents—most notably, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 763 (1995), *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984)—to hold unconstitutional the Syracuse creche display. This publicly funded, publicly sponsored religious display on public property, situated in a major public park, emblazoned with a clearly sectarian message, and framed by police barricades bearing the name of the mayor agency, unavoidably signals to a reasonable observer public endorsement of religion.

It bears noting that the City of Syracuse overlooked a practical, common-sense solution that follows from the Supreme Court's most recent encounter with these difficult issues, *Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2440. Since the Court has indicated that privately sponsored religious displays in publicly owned traditional public forums are less likely to encounter constitutional problems than government-sponsored religious displays, see *Capitol Square*, 515 U.S. at

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government actions. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947).

_____, 115 S.Ct. at 2448 (plurality opinion); *id.* at ___ - ___, 115 S.Ct. at 2452-53 (O'Connor, J., concurring); *id.* at ___ - ___, 115 S.Ct. at 2460-61 (Souter, J., concurring), relying upon the initiative of private groups, rather than government entities, to erect holiday displays in such forums would help to extract municipalities and the courts from this constitutional thicket. The City opted, instead, for a much more direct and visible embrace of religion, and of one religious tradition over others. We cannot condone its actions without stretching controlling precedents to the breaking point. Accordingly, I respectfully dissent.

I

For some time, the Supreme Court's guidance on the Establishment Clause—often by fractured decisions and multiple concurring opinions—has been less than crystal clear. As a consequence, our courts are confronted with a steady stream of cases requiring them to engage in an ill-defined, fact-specific inquiry in "this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

In *Lemon*, the Court held that in determining whether a governmental action violates the Establishment Clause, courts must consider: (1) whether the challenged practice has a secular purpose; (2) whether the practice either advances or inhibits religion in its principal or primary effect; and (3)

whether the practice fosters excessive government "entanglement" with religion. *Id.* at 612-13.[3]

Years later, in *Allegheny*, 492 U.S. at 592-94, 601, the Supreme Court, following Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 667, 104 S.Ct. at 1365 (O'Connor, J., concurring), interpreted the second prong of the Lemon test by adopting the endorsement test, which "precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," *Allegheny*, 492 U.S. at 593, 109 S.Ct. at 3100 (internal quotation marks and alterations omitted), and prohibits "making adherence to a religion relevant in [some] way to a person's standing in the political community," *Lynch*, 465 U.S. at 667. In *Lynch*, the Supreme Court had found that a city-sponsored holiday display in a

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3. It has been suggested that the continuing vitality of the *Lemon* test may be uncertain. See, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 608 U.S. 384, 396-400 (1993) (opinion of Scalia, J., with Thomas, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie ..., *Lemon* stalks our Establishment Clause jurisprudence.... Over the years ... no fewer than five of the currently sitting Justices have ... personally driven pencils through the creature's heart .... The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.").

private park did not violate the Establishment Clause. We were reminded later that the holiday display approved by the Court in *Lynch* included, in addition to a creche,

> a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa's sleigh; a live 40-foot Christmas tree strung with lights; statues of carolers in oldfashioned dress; candy-striped poles; a "talking" wishing well; a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear.

Allegheny, 492 U.S. at 596 (Blackmun, J., concurring).

In *Allegheny*, however, the Court applied the endorsement test and found that a creche display did violate the Establishment Clause, while a Chanukah menorah display did not. The *Allegheny* creche display was located on the Grand Staircase of the Allegheny County Courthouse. The creche was surrounded by poinsettias and included an angel bearing a banner proclaiming "Gloria in Excelsis Deo!" The menorah display, on the other hand, was under an arch outside another public building, a short distance away from the County Courthouse and next to a forty-five-foot Christmas tree decorated with lights and ornaments. At the foot of the Christmas tree, a sign was placed bearing

the mayor's name and the message "Salute to Liberty." Beneath this message, the sign read:

> During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.

Id. at 581-82 (Blackmun, J., concurring).

In the wake of *Lynch* and *Allegheny*, each of which contained multiple and conflicting opinions, lower courts have been required to engage in intensive fact-specific analyses to apply the endorsement test—analyses that Justice Kennedy predicted in *Allegheny* would amount to "a jurisprudence of minutiae" relying on "little more than intuition and a tape measure." *Id.* at 674-76 (Kennedy, J., concurring in the judgment in part and dissenting in part). Although I am mindful of the difficulty of making these fact-specific determinations, I conclude that the display in the case before us conveys a message of government endorsement of religion and therefore cannot pass muster under the Establishment Clause. I believe that, in finding otherwise, the majority relies too heavily on the nature of other decorations throughout downtown Syracuse. While not entirely irrelevant, those other decorations are not sufficient to overcome the effect of perceived religious endorsement by the City that the creche—containing an overtly sectarian slogan, surrounded by municipal government barricades and

appearing at the foot of the City's main Christmas tree display—would have upon a reasonable observer.

Another important factor in this case, although not by itself dispositive, is the sponsorship of the creche by the City. As noted above, the Supreme Court's recent decision in Capitol Square[4] indicates that, in the view of a clear majority of the Court, publicly sponsored religious displays are more likely to run afoul of the Establishment Clause than privately sponsored displays. See *id.* 515 U.S. at _____, 115 S.Ct. at 2448 (plurality opinion written by Scalia, J., for himself, the Chief Justice, and Justices Kennedy and Thomas); *id.* at _____- _____, 115 S.Ct. at 2452-53 (O'Connor, J., concurring, joined by Justices Souter and Breyer); *id.* at _____- _____, 115 S.Ct. at 2460-61 (Souter, J., concurring, joined by Justices O'Connor and Souter); *cf. Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir.1996) (O'Scannlain, J., concurring) (concluding that a government display of a cross as part of a war memorial on public land was unconstitutional, but suggesting that a different result

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4. In *Capitol Square*, the Supreme Court found that the Establishment Clause was not violated by the display of a Ku Klux Klan-sponsored Latin Cross, standing alone in a plaza surrounding the Ohio state capitol building that was traditionally used as a forum for public speech. *Capitol Square*, 515 U.S. at -115 S.Ct. at 2444.

might ensue if either the display or the land was privately owned.

Although the display's sponsorship does not necessarily or conclusively determine its constitutionality, it is a relevant and important factor in cases such as this one, where we are otherwise forced to rely on "minutiae" such as "tape measure[ments]" or the counting of reindeer, Santas, elves and other secular objects.

II

The majority adopts the district court's determination that the creche display in the instant case is permissible under *Lynch* and *Allegheny*. *Ante*, at _____. I disagree. I believe that the district court misapplied *Lynch* and *Allegheny* to the facts of this case.[5] I disagree with the district court's conclusion,

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5. The district court's determination of "whether a government activity communicates endorsement of religion is not a question of simple historical fact .... [T]he question is ... in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring). Although the resulting decision is different, I believe that here, as in *Lynch*, the "District Court's conclusion concerning the effect of [the City's] display of its creche was in error as a matter of law." *Id.* at 694. Among other things, the district court erred by aligning itself with the dissent of Justice Kennedy in

accepted by the majority, that the creche display in this case was more similar to the menorah/Christmas tree display in *Allegheny* (which survived constitutional attack) than to the creche display in Allegheny (which was held to be an unconstitutional endorsement of religion).

The majority apparently relies on the alleged similarity between the creche display in the case before us and the menorah/Christmas tree display in *Allegheny*, and notes that the *Allegheny* menorah/Christmas tree display was stored, erected, and removed by the City of Pittsburgh. (I note that the *Allegheny* menorah itself, like the menorah in the instant case, was owned by Chabad Lubavitch, a private religious organization).

Allegheny: the idea asserted by the district court that the creche display was an accommodation of religion was flatly rejected by the Supreme Court in *Allegheny*, see 492 U.S. at 601 n.51 (rejecting Justice Kennedy's characterization of the religious displays in that case as accommodations of religion), 613 n. 59; and the district court's reliance on such cases as *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding state legislature's traditional practice of opening legislative session with prayer by paid chaplain) was misplaced, in view of the Supreme Court's treatment of *Marsh* in *Allegheny*, see 492 U.S. at 603 (criticizing Justice Kennedy's failure to "distinguish between a specifically Christian symbol, like a creche, and more general religious references, like the legislative prayers in *Marsh*").

There is, however, a critical distinguishing factor: the message of pluralism that the Supreme Court believed was conveyed by the menorah/Christmas tree display, *id.* at 635 (O'Connor, J., concurring), and its secular context, *id.* at 613-21 (Blackmun, J., concurring) (noting presence of sign linking holiday season with idea of liberty, and emphasizing fact that Christmas tree and menorah represent different holidays, thus creating an "overall holiday setting"). It is this distinction—this reliance on a secular context and a message of pluralism—that enabled the menorah/Christmas tree display in *Allegheny* to survive constitutional scrutiny, notwithstanding the fact that the City of Pittsburgh subsidized the display.

Here, in contrast, it seems to me difficult to argue that the creche/Christmas tree display is "'stress[ing] the theme of liberty and pluralism." *Id.* at 635 (O'Connor, J., concurring). To the contrary, the creche appears clearly to suggest the City's endorsement of Christianity. The creche is placed in Syracuse's main downtown park; it is situated at the foot of the City's enormous Christmas tree; and it is surrounded by City barricades bearing the name of the mayor of Syracuse and a municipal government agency. Furthermore, as in the creche display held unconstitutional in *Allegheny*, the creche display here has a banner with the words "Gloria in Excelsis Deo"—words that the Supreme Court in *Allegheny* found to convey an unequivocally

sectarian message.[6] *Id.* at 598 (noting that "[t]his praise to God in Christian terms is indisputably religious ... just as it is when said in the Gospel or in a church service").

The district court's erroneous analysis of the creche display in the instant case was compounded by the fact that it focused its analysis too much on the holiday decorations throughout the greater downtown Syracuse area, rather than concentrating more specifically on the creche display at issue. While I agree with the majority that "a reasonable observer is not one who wears blinders," *ante*, at _____, I believe that a reasonable observer would view the creche, together with the Christmas tree, as a separate, clearly demarcated exhibit, distinct from any of the other holiday displays in the downtown area, and in a prominent position clearly indicating sponsorship by the City of Syracuse. In viewing the relevant holiday display as consisting of the entire downtown area, the majority disregards the only explicit Supreme Court teaching addressing how broadly we ought to delineate or define the display under review, for purposes of the endorsement test. In

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6. The phrase "Gloria in Excelsis Deo," which means "Glory to God in the Highest," comes from Luke 2:13-14 (King James Version. See *Allegheny*, 492 U.S. at 580 n. 5 (Blackmun, J., concurring).

analyzing the creche display in *Allegheny*, the Court pointedly noted that

> [t]he presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Allegheny, 492 U.S. at 598 n. 48 (emphasis added). In the instant case, the record demonstrates that the creche and the Christmas tree together, framed by City barricades, each bearing a reference to the City's mayor and to a City agency, "was its own display" distinct from any other decorations or exhibitions in the area. Nor were the decorations in Syracuse's Clinton Square (or, for that matter, even in downtown Syracuse as a whole) similar to those in *Lynch*, where a single park display contained numerous festive secular decorations. See *Lynch*, 466 U.S. at 670; see also *Allegheny*, 492 U.S. at 596 (Blackmun, J., concurring). In Clinton Square there was only a creche, a Christmas tree, and a few lights and wreaths. The remaining City-sponsored decorations in downtown Syracuse were sparse—consisting mainly of scattered lights, wreaths, and wire figures. A reasonable observer would view the creche display as a distinct exhibit, and there were

no other City-sponsored secular displays in the area whose presence would cumulatively dispel the impression that the City was endorsing Christianity by its prominent display of the creche. In these circumstances, the district court should have considered more carefully the narrower question of whether the City's display of a creche (alone) next to a Christmas tree in a prominent public place constitutes an endorsement of religion, not whether the display of a creche, along with other holiday displays throughout the greater downtown area, constitutes an endorsement of religion.[7]

Moreover, to whatever extent a reasonable observer would examine the area surrounding the creche display, such an observer could not help but notice that (as if to emphasize the City's apparent endorsement of

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7. In denying that the creche display would suggest government endorsement of religion to a reasonable observer, the majority goes on to claim that such an observer would know that "downtown Syracuse merchants encourage the holiday display" and "that a principal purpose of the celebration [is] to preserve the economic viability of downtown retailers." *Ante*, at _____. The majority has in mind not a "reasonable, informed observer" but an omniscient observer, whose experience sweeps in not just what is visible to the naked eye or to an aware citizen of the community but the unseen closed-door meetings of local retailers and politicians as well.

Christianity through its prominent creche display) a private menorah display appears nearby, down a side street in what seems to be a traffic circle, away from the main holiday display that appears in Syracuse's principal public square. The menorah display has no City barricades surrounding it, no references to the mayor of Syracuse nearby, and bears a sign clearly indicating that it is sponsored by a private organization which mounted the display. I believe that a reasonable observer would view the prominent, official display of the creche in the main public square of Syracuse, coupled with the rather unobtrusive, private menorah display, tucked away on a side street, as further evidence of the government's endorsement of Christianity.[8]

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8. To the extent that the City decides where the menorah display and the creche display are to be placed, the City must avoid the appearance that the City is favoring the creche display over the menorah display. See *Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2447 (stressing equal access to public space in finding that display did not violate Establishment Clause); see also *Allegheny*, 492 U.S. at 599-600 (stressing prominence of location of creche, and lack of access of other groups to location, in finding it to be an impermissible endorsement of religion).

III

The fact that the creche display is sponsored by the City is surely relevant to any decision under the endorsement test. Although ignored by the district court, the Supreme Court's most recent "religious display" case, *Capitol Square*, relied on the distinction between government-sponsored expression and private expression. The plurality opinion by Justice Scalia (writing for himself, the Chief Justice, and Justices Kennedy and Thomas) and the concurring opinion by Justice O'Connor (writing for herself and Justices Souter and Breyer) both noted that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* 515 U.S. at _____, 115 S.Ct. at 2448 (plurality opinion) (internal quotation marks omitted); *id.* at _____, 115 S.Ct. at 2452 (O'Connor, J., concurring) (internal quotation marks omitted).

While the plurality in *Capitol Square* found that the endorsement test enunciated and elaborated in *Lynch* and *Allegheny* did not apply to private religious displays in traditional public forums, virtually all of the Justices agreed that the endorsement test should apply to government-sponsored religious expression. See *Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2448 (opinion of Scalia, J., with Rehnquist, C.J., Kennedy

and Thomas, JJ., concurring); *id.* at _____ - _____, 115 S.Ct. at 2458-59 (opinion of Souter, J., with O'Connor and Breyer, JJ., concurring); *id.* at _____, 115 S.Ct. at 2465 (Stevens, J., dissenting). Moreover, as the majority notes, *ante*, at _____, we have held that when interpreting *Capitol Square*, we look in particular to the "outcome determinative" concurring opinions of Justices O'Connor and Souter in that case, see *Creatore*, 68 F.3d at 61—and both of those concurring opinions indicate that whether a religious display is publicly or privately sponsored is relevant to the endorsement test.[9] *Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2453 (O'Connor, J., concurring); *id.* at _____, 115 S.Ct. at 2458 (Souter, J., concurring). The emphasis that these two "outcome determinative" opinions in *Capitol Square* placed on the private nature of the religious speech in question there, when read together with the

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9. Justice O'Connor also found that an important factor in determining whether a private display in a traditional public forum constitutes an endorsement of religion is "the presence of a sign disclaiming government sponsorship or endorsement on the ... cross, which would make the State's role clear to the community." *Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2453 (O'Connor, J., concurring). Likewise, Justice Souter's concurring opinion favored the use of a sign disclaiming government sponsorship of private religious displays in a traditional public forum. *Id.* at _____ -_____, 115 S.Ct. at 2461-62 (Souter, J., concurring).

plurality opinion of Justice Scalia, indicates that a clear majority of the Court would agree that government-sponsored religious displays on public property—while not *per se* unconstitutional—are more likely to fail the endorsement test than are private displays.[10]

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10. In noting that the private sponsorship of a creche on public property would be more likely to pass constitutional muster than a government-sponsored creche, I am by no means suggesting that it would be appropriate, much less constitutional, for the City to solicit the private funding of religious displays. Rather, where there are strong and sincere religious sensibilities favoring displays of this kind—the very sensibilities that, joined with commercial interests, may have animated the City here, according to the majority—religious organizations and private groups affiliated with them (such as a local council of Christian churches or the Knights of Columbus in the case of creches, and Chabad Lubavitch or other Jewish groups, in the case of menorahs) would surely be eager to assume on their own initiative the modest cost of such religious displays, receive appropriate recognition for doing so, and help forestall litigation of this sort. *Cf. Capitol Square*, 515 U.S. at _____, 115 S.Ct. at 2453 (O'Connor, J., concurring) (noting importance of presence of sign clarifying private nature of display); *id.* at _____ - _____, 115 S.Ct. at 2461-62 (Souter, J., concurring) (same). Similarly, if commercial enterprises see opportunities in sponsoring such displays during the

This is not to say that under *Capitol Square* the government may never sponsor displays with religious symbols.[11] Rather, the controlling precedents teach that the government may not sponsor religious displays where the overall context of the display conveys a message of endorsement of religion.

Accordingly, in light of *Lynch*, *Allegheny*, and *Capitol Square*, I am persuaded that the creche display

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holiday season, they too will surely seize them, while making it less likely that the City appeared to endorse religion. As a general matter, the Supreme Court's teachings indicate that religious or other groups seeking space and time in these public areas can handle these matters on their own, largely without the need for government involvement, much less "entanglement," see *McCreary v. Stone*, 739 F.2d 716, 725 (2d Cir.1984) (noting that, in handling applications by religious groups to use public space, government "will have to do no more than when evaluating any other request for access to its public properties"), aff'd by an equally divided Court, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985), and thereby help make chronic and divisive litigation of this sort a thing of the past.

11. Clearly there would be no Establishment Clause violation, for example, in the government's sponsorship of the display of religious artwork at "a governmentally supported museum[ ]." See *Lynch*, 465 U.S. at 683.

in the case before us violates the Establishment Clause.[12]

IV

I respectfully dissent because I conclude that the creche display in this case fails the endorsement test enunciated by the Supreme Court under the Establishment Clause of the First Amendment.

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12. Although the majority claims that the City also paid $460 to fund the menorah display, for which it was not reimbursed by Chabad Lubavitch, *ante* at _____, that information, even if true, is not a part of the record before us. See *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 626 (2d Cir. 1990) (refusing to consider contention on appeal, "[i]n view of the dehors the record factual nature of [the claim]"). That information, if true, is arguably less significant than the government's sponsorship of the creche display in the instant case because, given the presence of a sign indicating private sponsorship of the menorah display and the modest sand marginal nature of the display, it is less likely that a reasonable observer would regard the display as a government endorsement of religion. In any event, because appellant has not challenged the City's funding of the menorah, we need not consider this question on appeal.

APPENDIX B

APPENDIX B

Decision and Order of the US District Court
for the Northern District of New York

No. 950 CV-1830 (FJS)

UNITED STATES DISTRICT COURT
Northern District of New York

CAROL A. ELEWSKI,

Plaintiff,

v.

CITY OF SYRACUSE and ROY BERNARDI, in his official capacity as Mayor of the City of Syracuse,

Defendant.

APPEARANCES:

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FREDERICK J. SCULLIN, JR., D.J.:

DECISION AND ORDER

Introduction

This is an action pursuant to 42 U.S.C. § 1983. Plaintiff alleges a violation of the Establishment Clause of the First Amendment to the United States Constitution. Plaintiff seeks a declaratory judgment declaring the nativity display ("creche") located in Clinton Square in the City of Syracuse ("City") unconstitutional under the Establishment Clause. Plaintiff also seeks a permanent injunction enjoining the City from erecting and displaying the creche or other similar religious displays in Clinton Square or any other property owned, maintained, or controlled by the City of Syracuse.

Factual Background[1]

Plaintiff is a self-described atheist and resident of the City. Defendants are the City and the Mayor of Syracuse in his official capacity. The creche at issue in this case is displayed annually in Clinton Square, a public park owned and controlled by the City. The creche is owned by the City and is transported, erected, maintained and dismantled by three City employees at a cost of approximately $396.00. The City's total holiday display budget is $11,900.00.

The display contains statue[s] of a baby, a woman, and a man (representing the infant Jesus, Mary and Joseph), plus a shepherd, a donkey, a lamb, and an angel suspended above the other statutes bearing a banner stating "Gloria in Excelsis Deo." The statutes rest on a wooden platform raised approximately two feet above sidewalk level and measuring approximately ten feet by eight feet. The creche is illuminated at night with two forty watt spotlights, which are paid for by the City.

Directly behind the creche is a fifty-five foot Christmas tree decorated with colored lights and a star at the top. The City also pays for the transport, erection, illumination and dismantling of the Christmas

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1. The facts as set forth below are derived from stipulations of the parties and testimony from the consolidated hearing.

tree. Surrounding the creche and Christmas tree are police barricades with red lettering stating "special events" and "Roy A. Bernardi, Mayor." The City decorates other trees and bushes in Clinton Square with colored lights and figurines. Lampposts throughout the downtown area are also decorated with artificial greenery, wreaths, and colored lights.

Hanover Square, another public park located approximately 200 feet from Clinton Square, is decorated by the City with twelve wire bells containing artificial greenery and lights, another Christmas tree with colored lights and a star, and lights and wire in the shape of snowman and reindeer. Hanover Square also contains a menorah owned by Chabad Lubavitch, a private religious organization. The menorah is displayed for a portion of the time period in which the City displays its holiday decorations, and is located approximately 300 feet from the creche. A sign posted on the menorah makes a brief statement about Chanukah and lists Chabad Lubavitch and its phone

number.[2] The City assisted Chabad Lubavitch in erecting, dismantling and lighting the menorah, and billed Chabad Lubavitch $287.68 as partial reimbursement for the costs incurred by the City.

The creche, along with the rest of the City's holiday decorations, were erected by the City on November 24, 1995, and dismantled by the City on January 6, 1996. The City has erected and displayed the creche for approximately the same timer period for many years. However, in 1995, the holiday decorations, including the creche, were erected the day after Thanksgiving rather than on the first Friday in December (the traditional date) in response to a request by the downtown business community to coordinate the City's decorations with the traditional start of the holiday shopping season.

At the consolidated hearing, both Mayor Roy A. Bernardi and Ronald Otis Jennings, the Commissioner for Parks and Recreation for the City

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2. The sign on the menorah reads:

THE LIGHTS OF THE MENORAH
COMMEMORATE THE MIRACLE OF CHANUKAH
--THE FREEDOM OF THE HUMAN SPIRIT.
FREEDOM FROM TYRANNY AND OPPRESSION
THE VICTORY OF LIGHT OVER DARKNESS
HAPPY CHANUKAH
CHABAD LUBAVITCH
424-0363

("Commissioner"), testified that the three purposes of the holiday decorations, including the creche, were to "bring the community together," to celebrate the holiday season, and to encourage area residents to patronize downtown businesses during the holiday shopping season. In addition to the displays, the City sponsors a number of activities during the holiday season including story telling, musical acts, magic shows, comedy acts, charity drives, and a Kwanza celebration during the week between Christmas and New Year's Day. The Commissioner also testified that the City, through a committee, attempts to accommodate reasonable requests for additional displays and events during the holiday season.

Procedural Background

Plaintiff first sought a temporary restraining order ("TRO") requiring the City to remove the creche from public display pending a hearing on plaintiff's application for a preliminary injunction. In response, defendants cross-moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b) for lack of standing and for failure to state a claim. This Court issued an Order December 28, 1995, denying the application for a TRO and ordered a consolidated hearing on the merits

pursuant to Fed.R.Civ.P. 65(a)(2). The consolidated hearing was held on January 11, 1996, in Syracuse.[3]

Discussion

I. Defendants' Cross-Motion

Initially, the Court will address the defendants' cross-motion to dismiss the complaint on the grounds that the plaintiff lacks standing to bring this action, and that the pleadings fail to state a claim cognizable under 42 U.S.C. 1983.

A. Standing

As a general matter, the doctrine of standing embraces both constitutional and prudential considerations. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Case and Controversy Clause in Article III of the Constitution mandates that a plaintiff allege an "actual or threatened injury" that is "fairly traceable" to the alleged unlawful conduct of the defendants and is "likely to be redressed by the relief requested." *Allen v. Wright*, 468 U.S. 737, 751 (1984). One of the most important prudential considerations is the requirement that a case or controversy concern individualized injury

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3. Both plaintiff and defendants also attempted to move for summary judgment but filed to follow proper procedures. However, these failures are immaterial as the Court can determine the case on the merits based on the undisputed facts in the record as well as the evidence obtained at the consolidated hearing.

rather than merely a "generalized grievance." *Warth*, 422 U.S. at 499-500; see also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (finding no standing where Congressional spending power was not involved and plaintiffs were asserting a generalized grievance).

However, the Supreme Court has not seen fit to address the standing issue in its more recent cases involving the Establishment Clause. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 598-602 (1989) (local residents and chapter of ACLU challenge holiday displays); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (parent challenges school prayer statute); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (local residents and chapter of ACLU challenge City sponsored holiday display). It would therefore seem fair to infer from these cases that a more liberal approach should be taken when evaluating the standing requirements for a plaintiff challenging a government practice under the Establishment Clause.

In this case, defendants cross-move to dismiss the complaint on the grounds that plaintiff lacks standing to bring this action because she failed to allege actual injury. However, in her complaint, plaintiff alleges four individual injuries flowing from the City's display of the creche: (1) impairment of her use and enjoyment of Clinton Square; (2) that she must alter her normal

travel routes through the City to avoid viewing the display; (3) that she feels diminished and marginalized in the political community when viewing the creche; and (4) that as a municipal taxpayer, she objects to the City's expenditure of tax revenues to erect, maintain, illuminate, and dismantle the creche. Complaint at ¶¶ 12-14. Such allegations are sufficient to satisfy the requirement of individualized injury.

Defendants further suggest that before plaintiff may bring this action, she is required to "demonstrate" either: (1) a governmental endorsement of religion; (2) that she was coerced to participate in or involuntarily subjected to religion; or (3) that the primary purpose of the challenged practice was religious in nature and an unconstitutional entanglement of government and religion.[4] However, this argument is flawed because such a requirement would have the Court decide the merits of the case in order to determine whether plaintiff has standing to bring an action.

Therefore, under the accepted legal standards set forth above, the Court finds that Ms. Elewski has standing to bring this action because she has alleged injuries that are sufficiently "individualized" and are

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4. Defendants' Memorandum of Law at 5; citing *Lynch v. Donnelly*, 465 U.S. 668 (1984); *City of Grand Rapids v. Ball*, 472 U.S. 373 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

such that they would "likely be redressed by the relief requested."[5]

B. Failure to State a Claim

In evaluating a motion to dismiss for failure to state a claim, the Court must "accept as true all the factual allegations in the complaint" and draw all reasonable inferences in favor of the plaintiff. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160, 1161 (1993); *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). "[T]he court should not dismiss the complaint for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Ricciuti v. New York City Transit Auth.*, 941

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5. Although not explicitly addressed by defendants, the Court finds that plaintiff also has standing under the standards discussed by the Supreme Court in *Valley Forge Christian College*. In that case, the Court held that the plaintiffs lacked standing to assert an Establishment Clause violation flowing from a government transfer of property to a religious organization because plaintiffs did not demonstrate any personal involvement or injury flowing from the challenged transfer. 454 U.S. at 486.

However, the case at bar is distinguishable from *Valley Forge*. Here, Ms Elewski specifically alleges that she is personally injured in three different ways, and in addition alleges that she has standing as a taxpayer.

F.2d 119, 123 (2d Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

"The function of a motion to dismiss 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 744, 779 (2d Cir. 1984) (quoting *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)).

In order to establish a prima facie case under 42 U.S.C. §1983, plaintiff must allege that "'the conduct complained of was committed by a person acting under color of state law,'" and that the conduct deprived the plaintiff "'of rights, privileges or immunities secured by the Constitution or laws of the United States.'" *Martinez v. Simonet*, 919 F.2d 808, 810 (2d Cir. 1990) (quoting *Parrat v. Taylor*, 451 U.S. 527, 535 (1981)).

Here, plaintiff alleges that the City of Syracuse and the Mayor, in his official capacity, violated her rights under the Establishment Clause. Thus, plaintiff has satisfied the pleading requirements of the statute and has stated a claim under 42 U.S.C. § 1983. Therefore, defendants' motion to dismiss for failure to state a claim must be denied.

II. Plaintiff's Request for a Preliminary and Permanent Injunction, and Declaratory Judgment

A movant seeking a preliminary injunction must show (1) either (a) a likelihood of success on the merits or (b) that the merits present serious questions for litigation and that the balance of hardships tips decidedly toward the plaintiff; and (2) irreparable harm if the injunction is not issued. *Fisher Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 122 (2d Cir. 1994).

However, where a plaintiff seeks a "permanent injunction" and the court has consolidated the hearing on the motion for a preliminary injunction with a hearing on the merits pursuant to Fed.R.Civ.P. 65(a)(2), the plaintiff must (1) prevail on the merits, (2) demonstrate a lack of an adequate remedy at law, and (3) the balance of equities must tip decidedly in favor of plaintiff. *Automotive Elect. Serv. Corp. v. Association of Automotive Aftermarket Distribs.*, 747 F.Supp. 1483, 1513 (E.D.N.Y. 1990) (citations omitted); see also, *Rosenberg v. Meese*, 622 F.Supp. 1451, 1476 (S.D.N.Y. 1985). This opinion focuses on whether plaintiff prevails on the merits of her claim.

Plaintiff argues that the creche display in Clinton Square violates the Establishment Clause because it constitutes government endorsement of Christianity. Plaintiff seeks both a declaratory judgment to that effect and a permanent injunction barring the City from

erecting or displaying the creche or other similar religious displays on government property. However, at the consolidated hearing plaintiff was more circumspect and argued that the crux of her complaint is that the City owns the creche and uses City tax revenues to erect, maintain, illuminate and dismantle the display.

The First Amendment to the United States Constitution provides that government "shall make no law respecting an establishment of religion or the free exercise thereof ...." *U.S. Const. amend. I.* Plaintiff alleges a violation of her rights under the Establishment Clause, not the Free Exercise Clause.

Establishment Clause jurisprudence is fraught with controversy and filled with diverse opinions.[6] Nevertheless, there are some general principles that have evolved.

For the Founding Fathers, the Establishment Clause "connoted sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970). Over 150 years ago, Justice Story wrote, "the real objective of the [First] Amendment was ... to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive

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6. Justices of the Supreme Court often agree on the result, but differ on the reasoning of a case.

patronage of the national government." *Lynch*, 465 U.S. 678 (quoting 3 Story, Commentaries on the Constitution of the United States, 728 (1833).

As Justice Douglas observed in 1952, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).[7]

In 1970 the Supreme Court , in *Walz v. Tax Comm'n of the City of New* York, made it clear that "the purpose of the [Establishment Clause] was to state an objective, not to write a statute." 397 U.S. 664, 668 (1970). This principle was later reaffirmed by the Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (Burger, C.J.).

In 1971, in *Lemon v. Kurtzman*, the Supreme Court defined a three-part test which lower courts could follow in analyzing alleged violations of the Establishment Clause. 403 U.S. 602, 612-13 (1971). That test requires courts to consider: (1) whether the challenged practice has a secular purpose; (2) whether the practice either advances or inhibits religion in its principle or primary effect; and (3) whether the practice

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7. In *Zorach* the Supreme Court upheld a statute which provided for the release of public school students from school attendance in order to attend religious classes. 343 U.S. at 313.

fosters excessive government entanglement with religion. *Id.*

Subsequently, however, the Supreme Court has declined to strictly apply the *Lemon* test to all Establishment Clause cases, preferring to view each case in its specific context in light of the constitutional objective. In *Marsh v. Chambers* for example, the Supreme Court addressed a challenge to the constitutionality of the Nebraska Legislature's traditional practice of opening the legislative session with a prayer by a paid chaplain. In upholding the practice, the Court relied almost exclusively on historical analysis and concluded that:

> [t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" or religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

463 U.S. 781, 792 (1983).

Recent cases involving the Establishment Clause have focused on whether the challenged practice has the specific purpose or effect of "endorsing" religion. Specifically, in the context of government sponsored religious displays during the Christmas holiday season, this Court has the unusual advantage of being guided by two Supreme Court cases that have analyzed such practices vis-a-vis the Establishment Clause. See

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

In *County of Allegheny*, the Supreme Court again made clear that government may not prefer, promote, or favor one religion or religious theory over another. 492 U.S. at 593 (citations omitted). There, the Court deemed unconstitutional a holiday display consisting of a creche surrounded by poinsettia plants located on the "Grand Staircase" of the county courthouse. 492 U.S. 573, 598 (1989). The Court found that placement of the creche display in that particular setting sent an "unmistakable message that [the county] supports and promotes the Christian praise to God that is the creche's religious message." *County of Allegheny*, 492 U.S. at 600.

However, the *Allegheny* Court upheld the constitutionality of another holiday display located outside on the lawn of a public building that featured a menorah next to a large Christmas tree. *Id.* at 620-21. According to the Court, the tree was clearly the dominant element of the display and the reasonable observer could not perceive the display as an endorsement or disapproval of their individual religious choices. *Id.* at 617, 620. For the reasons that follow, the Court finds the creche display in this case to be factually more analogous to the menorah in *County of Allegheny*.

in *Lynch v. Donnelly* the Supreme Court upheld the inclusion of a creche in a city holiday display located in a downtown park. 465 U.S. at 670 (1984). In addition to the creche, the city's display contained, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures of a clown, elephant and teddy bear, hundreds of colored lights, and a large banner reading "Seasons Greetings." *Id.* The figures in the creche included the infant Jesus, Mary, Joseph, angels, shepherd, kings and animals. *Id.* The *Lynch* creche was purchased by the City for $1365.00, and the City spent approximately $20.00 per year maintaining the creche. The *Lynch* court found there was insufficient evidence to conclude that the creche was a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message," and upheld the display. *Id.* at 680. The Court determined that the display depicted "the historical origins of this traditional event long recognized as a National Holiday," and that it "had the legitimate secular purpose of celebrating the Holiday and to depict the origins of that Holiday." *Id.*

In this case, the creche displayed in Clinton Square is also sponsored and maintained by the City, although it was apparently donated to the City many years ago. As stated, the cost to transport, erect, maintain, and dismantle the creche is $396.00 out of the entire

holiday display budget of $11,900.00. In view of the overall expenditures by the City to promote the holiday season, as testified to at the consolidated hearing, the Court finds the expenditures by the City to erect and maintain the creche to be de minimis.

Similar to *Lynch*, there is no evidence her of a "purposeful or surreptitious effort to express some kind of subtle advocacy of a particular religious message." *Id.* The City asserts that a purpose of the creche display is to recognize the historical origins of the Christmas holiday, a legitimate secular purpose under *Lynch*. In addition, the City also asserts that the creche, and the rest of its holiday decorations, serve the legitimate secular purposes of bringing the community together during the holiday season, and encouraging members of the community to patronize downtown businesses during the holiday shopping season.[8]

Like the creche in *Lynch*, the creche in this case must be considered in view of the City's extensive holiday decorations which include a menorah just a few hundred feet away in a neighboring park, and various non-religious decorations throughout the downtown area including wreaths, bells, lights, reindeer and a snowman. Like the menorah display in *County of*

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8. In fact, testimony at the consolidated hearing established that the City erected its holiday displays early in response to requests by the downtown business community.

Allegheny, the creche in this case is not dominant in the City's overall holiday decorations, but is actually dwarfed by a huge, brightly lit Christmas tree, a widely recognized secular symbol of the holiday season. 492 U.S. at 617 (Blackmun, J., plurality opinion).

Finally, Justice O'Connor, a "swing vote" in both *Lynch* and *County of Allegheny*, reminds us that "courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices which purport to celebrate or acknowledge events with religious significance must be subject to careful judicial scrutiny." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

However, it is also clear that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch*, 465 U.S. at 673 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (other citations omitted)). As recently as 1994, the Supreme Court again stated that "'government may (and sometimes must) accommodate religious practices and ... may do so without violating the Establishment Clause.'" *Board of Educ. of Kiryas Joel Village Sch.*

Dist. v. Grumet, 114 S.Ct. 2481, 2492 (1994) (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987)).

Even if this Court were to apply the *Lemon* test, which the Court in *Lynch* did not find to be strictly applicable, the City's sponsorship of the creche would also pass muster.

First, as stated above, the creche display serves the legitimate secular purposes of depicting the origins of the Christmas holiday, bringing the community together during the holiday season, and encouraging area residents to patronize downtown businesses during the holiday season shopping season. Thus, the creche display clearly passes the first prong of the *Lemon* test because it has at least three secular purposes.

Second, the creche in this case satisfies the second prong of the *Lemon* test because it cannot be viewed as a government "endorsement" of Christianity when viewed in the context of the City's decorations in Clinton Square and throughout the downtown area. Like the menorah in *County of Allegheny*, the creche in this case stands at the base of a fifty-five foot Christmas tree and can only be viewed from one angle. There are also numerous religious and non-religious decorations less than one hundred yards away in Hanover Square, including wreaths, reindeer, a snowman and the menorah. Furthermore, as previously stated, unlike the creche in *County of Allegheny*, which was located in the

Grand Staircase of the county courthouse, the creche in this case is located in a public park, not the main entrance of a government building.

Finally, under the third prong of the *Lemon* text, this Court finds that the creche display in this case, and the de minimis expenditures by the City in support of the display, do not amount to excessive entanglement of government and religion. The City spent less than four percent of its holiday decorations budget on the creche display during the 1995-96 holiday season, and unlike the creche which was upheld by the Supreme Court in *Lynch*, the City did not spend any public funds to acquire this creche. Moreover, there is no evidence of any contact between government authorities and church officials concerning the content or design of the Clinton Square display. To the contrary, testimony at the consolidated hearing established that decisions relative to the holiday decorations are made by an informal committee including the Mayor, the Department of Parks and Recreation, and the Syracuse community (represented by the Downtown Committee and the Metropolitan Development Association). See *Lynch*, 465 U.S. at 683. Thus, the creche display, and the public expenditures in support of the display, do not foster excessive government entanglement with religion. Therefore, the creche display passes all three prongs of [the] *Lemon* test.

Conclusion

Although the City's creche is undoubtedly a religious symbol and may confer some benefit on Christianity, the Supreme Court has made it abundantly clear that laws or government practices are not automatically invalid because they confer an indirect, remote, or incidental benefit upon religion. *Lynch*, 465 U.S. at 683 (citations omitted). The display of the creche in this case is "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmental supported museums." *Id.* It is "no more an endorsement of religion than such 'acknowledgments' of religion as legislative prayers ... governmental declaration of Thanksgiving as a public holiday, printing 'In God We Trust' on coins, and opening sessions of the Supreme Court and most other courts of the nation with 'God Save the United States and this honorable court.'" *Id.* at 692-93 (O'Connor, J., concurring).

"Government policies of accommodation, acknowledgment and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., dissenting). "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude

in recognizing and accommodating the central role religion plays in our society." *Id.* (citing *Lynch*, 465 U.S. at 678; *Walz v. Tax Comm'n of New York*, 397 U.S. at 669).

The City's creche display and the de minimis expenditures by the City in support of that display are tolerable acknowledgments of beliefs widely held in this community and do not establish a religion or take steps towards establishment. To hold otherwise would reflect an "unjustified hostility toward religion, a hostility inconsistent with our history and [Supreme Court] precedents." *County of Allegheny*, 492 U.S. at 655. Finally, as Chief Justice Burger stated:

> It would be ironic ... if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so "taint" the City's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while Congress and Legislatures open sessions with prayers by paid chaplains, would be stilted over-reaction

> contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Id. at 685-86.

The challenged creche display, and the City's de minimis support of the display, do not offend the Establishment Clause of the First Amendment to the United States Constitution. Therefore, plaintiff is not entitled to a declaratory judgment, preliminary injunction, permanent injunction or attorney's fees and the case must be dismissed in its entirety.[9]

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9. Although the issue is not directly presented, it was troubling to learn that the City charges Chabad Lubavitch for at least some portion of the City's assistance in displaying, maintaining and dismantling the menorah, while at the same time completely absorbing the cost of displaying the creche. Even though the costs of displaying the creche are de minimis, this policy gives at least an appearance of favoritism and a lack of neutrality. While the Establishment Clause does not require a complete separation of religion and government, the First Amendment does "compel [the government] to pursue a course of 'neutrality' toward religion" and does not allow the government to favor one religion over another. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. at 2487 (Souter. J., plurality

Therefore, it is hereby

ORDERED that defendants' motion to dismiss is DENIED, and it is further

ORDERED that plaintiff's motion for a preliminary injunction is DENIED; and it is further

ORDERED that judgment for defendants should enter and the case is DISMISSED in its entirety.

IT IS SO ORDERED.
Dated: January 19, 1996
Syracuse, New York

x/x/x/
Frederick J. Scullin, Jr.
U.S. District Judge

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opinion) (quoting *Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)).

APPENDIX C

APPENDIX C

Order of the US Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
for the Second Circuit

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of October, one thousand nine hundred and ninety-seven.

Docket No. 96-7227

CAROL A. ELEWSKI,

v.

CITY OF SYRACUSE

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Carol A. Elewski.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: x/x/x/
Beth J. Meador,
Administrative Attorney

APPENDIX D

APPENDIX D

Elewksi Letter dated 9/16/96
to Second Circuit Court of Appeals Case Manager

Carol A. Elewski
14 Kenneth Street
Mobile, Alabama 36607
(334) 473-7336

September 16, 1996

Ms. Angela Martin
Case Manager
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

Re: Elewski v. Syracuse, 96 7227

Dear Ms. Martin:

Please note that for matters of correspondence, I can now be reached at the address at the top of this page.

Thank you for your attention to this matter.

Very truly yours,

cc: Lisa DiPoalo Haber, Esq.

APPENDIX E

Light Up Syracuse Venues

Armory Square Association

Clinton Square

Everson Museum of Art

The Galleries of Syracuse

Ida Bendersen Senior Center

Landmark Theatre

Museum of Science & Technology (MOST)

Onondaga Historical Association Museum

On Track

Salina Place

The 259 Clinton Street Building

1998 Downtown Window Decorating Contest Ballot

Participating Businesses, Please Circle One

BEST AVAILABLE COPY

Schedule of Events

'Til 7 p.m.

Everson Museum of Art - The Museum's Galleries will remain open to the public. Featured exhibitions are *Romancing the Stone: Lithographs from the Syracuse University Art Collection, Art Explosion* and *Sung Pyo Hun*. In addition, the Museum Shop will be open. Admission: suggested $1 donation.

Milton J. Rubenstein Museum of Science & Technology (MOST) - Armory Square. Visitors can experiment with more than 100 hands-on science exhibits, including "SportScience," in which visitors can experience the feeling of a basketball player on a breakaway, or an ice skater in a fast spin or against a hockey goalie. Admission: $4.50 adults/$3.50 children ages 2-11, senior citizens

'Til 8 p.m.

Onondaga Historical Association Museum - Three exhibitions: *Fabric + Thread = Style*, a major historic fashion exhibit; *Crossroads*, historic and present-day photos; *Syracuse Breweries of the Past*, brewing memorabilia.

5:30 to 8:30 p.m.

The Galleries of Syracuse - Face Painting

5 to 8:30 p.m.

Armory Square & OnTrack - Visit Santa's Reindeer at Armory Square, at Franklin and Jefferson Streets. And stop by the free holiday party, presented by the Armory Square Association and OnTrack, at the OnTrack Station.

The Galleries of Syracuse - Have Your Picture Taken with Santa Claus, with proceeds going to the Make-A-Wish Foundation

5 p.m.

The Galleries of Syracuse - Onondaga Dance Institute, dance performance to holiday medleys. Celebrity reading of *Twas the Night Before Christmas* with Sue Webbe,ahl, City Hall Reporter, Herald Journal

Landmark Theatre - Chittenango High School Chorus

Salina Place - Schola Cantorum of Syracuse

The 250 Clinton Street Building - Deutscher Gesangverein

5:30 p.m.

The Galleries of Syracuse - *Phoenix*, a barbershop quartet with holiday favorites. Celebrity reading of *Twas the Night Before Christmas* with Lara Mosby, Hit Country 108

Ida Benderson Senior Center - Liverpool School of Dance

Landmark Theatre - Larry Hoyt and Cindy Lou

Onondaga Historical Association Museum - Charles Dickens Visits the OHA Museum - Mr. Dickens reads *A Christmas Carol* for families and children.

Salina Place - Second Olivet Baptist Church

The 250 Clinton Street Building - Kwanzaa Celebration

6 p.m.

The Galleries of Syracuse - Celebrity reading of *Twas the Night Before Christmas* with David Muir, WTVH-5

Ida Benderson Senior Center - Gaslight Brass

Landmark Theatre - Spirit of Syracuse

Onondaga Historical Association Museum - Charles Dickens Visits the OHA Museum - Mr. Dickens reads *A Christmas Carol* for families and children.

Salina Place - St. James Bell Choir

The 250 Clinton Street Building - Bavarian Club Almenrausch

6:30 p.m.

Landmark Theatre - Sue Ferguson, vocalist

Salina Place - Gaslight Brass

The 250 Clinton Street Building - Dance Centre North

7 p.m.

TREELIGHTING - Clinton Square. Join Mayor Roy A. Bernardi and special guests for this year's Treelighting Ceremony. The Department of Parks, Recreation and Youth Programs' All-Star Band, under the direction of Stan Colella, will offer a holiday concert, and Santa Claus will arrive on a show wagon pulled by P&C Food Markets' *Parade of Champions* Percheron Horse Team Unit. The Square also features several Giving Trees, which area not-for-profit organizations have "adopted" as a means of sharing in this community event. Candy canes provided by P&C Food Markets.

7:10 p.m.

The Galleries of Syracuse - Rene LeBeau, a Cajun comedy, juggling and rope trick act

7:30 p.m.

The Galleries of Syracuse - Celebrity reading of *Twas the Night Before Christmas* with Jim Sims and Lisa Michaels, WSEN's Morning Crew

Ida Benderson Senior Center - Genesis Chorale Ensemble of Hopps Memorial C.M.E. Church

Landmark Theatre - TBA

Salina Place - Spirit of Syracuse

The 250 Clinton Street Building - Tom Dooley Choralers

7:45 p.m.

The Galleries of Syracuse - Celebrity reading of *Twas the Night Before Christmas* with Dave Ryan, WSTM TV3

8 p.m.

The Galleries of Syracuse - Celebrity reading of *Twas the Night Before Christmas* with Armond Magnarelli, WFBL 1050AM

Ida Benderson Senior Center - Deutscher Gesangverein

Landmark Theatre - Epoch

Salina Place - The Masters Touch Chorale

The 250 Clinton Street Building - St. John the Baptist Ukrainian Catholic Church Ensemble

8:05 p.m.

The Galleries of Syracuse - Jackson Innis, a magic act

Giving Trees

Clinton Square

This year, several not-for-profit organizations have "adopted" trees in Clinton Square to share in this community event, to honor those individuals they serve, and to thank Central New Yorkers for their support.

Camp Good Days and Special Times is a camp for children and their families touched by cancer. We also offer year-round programs and support for children and families in the Central New York area.

Central New York Ronald McDonald House serves as a "home away from home" for families of children who are hospitalized with life threatening illnesses. We thank all of our friends and contributors for 13 years of support.

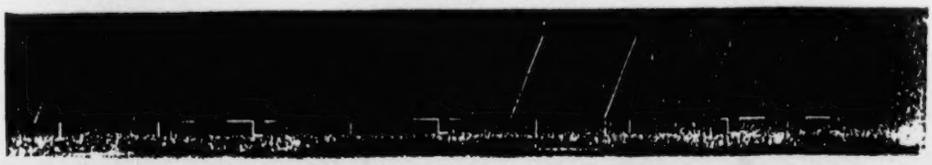
The Eye Research Foundation of Central New York is dedicated to continuing vital vision research and community education programs on eye health and safety.

Just for Babies is dedicated to reducing the infant mortality rate by providing the necessities of life for newborn or soon to be born babies.

Milton J. Rubenstein Museum of Science and Technology (MOST) is Syracuse's place to discover science and fun. Planetarium shows, live demonstrations, and 200 hands-on exhibits make the museum the MOST. Call 425-0747 for more information.

Project Children brings youngsters from Northern Ireland to the United States for six weeks of summertime fun with American host families.

Vera House Incorporated is a not-for-profit human service agency providing direct client service, community education, and community planning with a primary focus on domestic violence and the needs of women in crisis and their families.



Supreme Court, U.S.
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No. 97-1103

In The

Supreme Court of the United States

October Term, 1997

CAROL A. ELEWSKI,

Petitioner,

vs.

CITY OF SYRACUSE and ROY BERNARDI, in his official capacity as Mayor of the City of Syracuse,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of the Second Circuit's affirmance of the Northern District of New York's refusal to enjoin the inclusion of a crèche in the City of Syracuse's 1995 downtown holiday display as an Establishment Clause violation. The courts below were not in error and therefore the petition should be denied.

Annually, the City of Syracuse displays a crèche in Clinton Square, a public park in downtown Syracuse. In December of 1995, the crèche was displayed downtown. Behind it stood a Christmas tree approximately fifty-five feet high decorated with colored lights and a star at the top. Displayed also in Clinton Square were trees and bushes decorated with colored lights and figurines. Artificial greenery, wreaths and colored lights decorated the surrounding sidewalk lampposts.

Two hundred feet from Clinton Square is another public park, Hanover Square. It was decorated with twelve wire bells containing greenery and lights, a Christmas tree with colored lights topped by a star, a Jewish menorah, snowman and reindeer. Within the decorated downtown area the City sponsored a myriad of holiday activities ranging from musical acts to a Kwanza celebration.[1]

The courts below found that a reasonable observer would view the crèche within the context of the other downtown decorations, displays and the holiday season. Rejected was petitioner's claim that mere inclusion of the creche was an establishment of the Christian religion.

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1. Mayor Roy Bernardi and Ronald Jennings, Commissioner of Parks, Recreation, and Youth Programs for the City, testified that the seasonal displays were to bring the community together during the holidays and to promote downtown business.

No dispute appears over the controlling cases. In direct contravention to the lower courts' decisions, however, petitioner urges this Court to (1) determine that some displays and decorations were too far away from the crèche but the Christmas tree was too close; (2) focus primarily on the religious aspect of the crèche to the exclusion of its secular function; and (3) focus on the crèche to the exclusion of the other downtown displays, events and decorations.

This Court should not indulge requests to pull out its tape measure each time a municipality sets up a holiday display. Concerning such a fact-bound contention, the judgment of the district court should not be disturbed.

Alternatively, petitioner seeks to have this Court vacate the Second Circuit's judgment for "mootness" because she moved to Alabama pending the decision. Petitioner points to a letter she sent to the Second Circuit's case manager stating where she could be reached for "matters of correspondence." *Pet. App.* D. Petitioner however, failed to inform the court that she had made a permanent move. The letter fails to establish mootness. On the contrary, the evidence shows that claimant veiled her mootness claim pending the outcome of her appeal. The mootness doctrine cannot be applied in a way to sanction an abuse of the judiciary.

REASONS FOR DENYING THE WRIT

Petitioner's claim that the courts below abused their discretion in determining that the inclusion of the crèche in Syracuse's holiday display passed constitutional muster does not warrant review by this Court.

I.

REVIEW IS NOT WARRANTED BECAUSE THE CONTENTION IS PURELY FACT-BOUND.

No real dispute over the applicable law presents. The petitioners, the respondents, the Second Circuit majority, and the Second Circuit dissent all agree that the controlling cases are *Lynch v. Donnelly,* 465 U.S. 668 (1984); *County of Allegheny,* 492 U.S. 573 (1989) and *Capitol Square and Advisory Bd. v. Pinette,* 115 S. Ct. 2440 (1995). The nucleus of the dispute is the application of these cases to the facts.

Petitioner claims that the myriad seasonal displays and decorations are too far away from each other, and that the Christmas tree and the crèche are too close to each other. Plainly, the issue here is whether the proximity of the display decorations to the crèche form an "endorsement" of religion. As the dissent recognized, this is an "intensive fact-specific analys[is]." *Pet. App.* at 17a. *Accord Pet. App.* at 9a (majority views crucial issue as factual context of crèche). In concluding that a "reasonable observer" would not view the seasonal display as an establishment of religion, the courts below performed a careful analysis of the facts. Such a fact-bound contention of this nature does not warrant Supreme Court Review. *See* Supreme Court Rule 10.

II.

THE SECOND CIRCUIT PROPERLY FOLLOWED SUPREME COURT PRECEDENT BY REFUSING TO ISOLATE THE CRÈCHE FROM ITS FESTIVE ENVIRONS.

Just months before the petitioner challenged the crèche display, this Court decided *Capital Square* in which Justice O'Connor stated that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Id.* at 2452. Petitioner urges that such an observer is one who would disregard the festive environs surrounding the crèche. Such myopic scrutiny has been flatly rejected by this Court. On the contrary, "the knowledge attributed to the reasonable observer [cannot] be limited to the information gleaned simply from viewing the challenged display." *Id.* at 2455.

Applying this same principal in the context of a seasonal display, this Court stated that "the focus of our inquiry must be on the crèche in the context of the Christmas season." *Lynch v. Donnelly,* 465 U.S. 678, 670 (1984).[2] That principle was readily apparent to the Second Circuit when it observed: "A reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the crèche." *Pet. App.* at 9a. In fact, the

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2. Here, the facts largely paralleled those in *Lynch*. There, a public park in downtown Pawtucket, Rhode Island, contained

> figures and decorations traditionally associated with Christmas, including among other things, a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree . . . hundreds of colored lights . . . and the creche. . . .

Id. at 671. This Court found the display constitutional.

reasonable observer would be informed of the "history", "context", and "forum" concerning the crèche. *Capital Square,* at 2455.

To see the seasonal display here, the Second Circuit plainly observed:

> one has to use streets with lampposts decorated with artificial greenery, wreaths, and colored lights. . . . decorated trees, reindeer, a snowman, and wire bells. . . . the crèche would be visible on the right and the menorah would become visible on the left.

Pet. App. 10a.[3]

In its context a reasonable observer could not conclude that the crèche was an impermissible establishment of the Christian religion.

In *Allegheny*, this Court found that a menorah next to a tall Christmas tree, directly in front of the government City/County Building, was not an endorsement of the Jewish religion. Likewise, here, a crèche next to a tall Christmas tree in a public park cannot be an endorsement of the Christian religion.[4] Unlike the menorah

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3. Despite the many characteristics that the Second Circuit observed in the downtown display, petitioner argues that its review was not "particularized" enough. *Pet.* at 11. The apparent drive of this argument is to complain that there were too few secular symbols which were too far away from the crèche. Petitioner would have this court reviewing the minutia of every governmental holiday display to determine that the "particular" numbers, sizes and distances relative to each crèche result in sufficient secularization.

4. Referring to *Allegheny*, petitioner states

> In explaining why a menorah could [be] displayed together

(Cont'd)

in *Allegheny*, however, the crèche here cannot be observed on the steps of a government building. That a reasonable person would also simultaneously view the crèche, Christmas tree, lighted reindeer, menorah, snowman and correlative ornamentation, further erases the contention that the City of Syracuse is endorsing religion.

As in *Lynch*, the crèche here does no more than ". . . depict[ ] the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680.

III.

THE CLAIM OF MOOTNESS SHOULD BE REJECTED BECAUSE PETITIONER DID NOT CLAIM MOOTNESS UNTIL AFTER RECEIVING AN UNFAVORABLE DECISION BELOW.

Petitioner points to a letter written to the case manager of the Second Circuit of evidence that her claim was moot because she had moved. *Pet.* at 10. It appears that petitioner would have this Court read the letter as her formal motion to withdraw the case.

The letter — which states "for matters of correspondence, I can now be reached at the address at the top of this page" *Pet. App.* D. — does not remotely establish mootness. The letter

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(Cont'd)

> with a Christmas tree, this Court emphasized the immediate physical context of the menorah

Pet. App. 11 (citation omitted). Petitioner's point proves too much: that the creche in this case can be displayed because — precisely like the menorah in *Allegheny* — it is displayed together with the Christmas tree.

must be considered for what it does not say: that petitioner indeed moved, is planning to move, that the move is permanent, and that her controversy is not capable of repetition yet evading review, *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972), (*e.g.*, if petitioner regularly returns to Syracuse during the holidays).

If petitioner did in fact have a factual predicate for mootness, she should have argued mootness before the Second Circuit prior to its decision. To keep a mootness claim in reserve, while waiting to see whether the court's decision will be favorable, is to abuse the judicial system. This Court should not honor such conduct.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 97-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROL A. ELEWSKI,

Petitioner,

—vs.—

CITY OF SYRACUSE, and ROY BERNARDI,
in his official capacity as Mayor of the City of Syracuse,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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February 12, 1998

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I

THE DECISION BELOW IS INCONSISTENT WITH *ALLEGHENY* COUNTY

Respondents cite as governing law a sentence from *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984): "In this case, the focus of our inquiry must be on the creche in the context of the Christmas season." Building on the premise that that sentence requires an evaluation of the challenged creche in the context of holiday displays scattered throughout the City, Respondents assert that the only issue before the Court is factual, not worthy of this Court's attention.

The difficulty with this argument is that, as explained at length in the Petition (pp. 10-13), the cited sentence was interpreted otherwise in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The question raised by Petitioner is what legal standard governs disputes about the constitutionality of officially sponsored religious symbols—whether, as the court below held, the focus should be the Christmas season as celebrated in all of the city, or on the symbol and its immediate physical environs. As demonstrated in the Petition, *County of Allegheny* commands a focus on the religious display and its immediate environs.

Respondents do not challenge Petitioner's assertion that the Second Circuit did not focus on the creche and its immediate environs. They likewise do not challenge Petitioner's reading of *Allegheny County*. The palpable inconsistency of the decision below with *Allegheny County* calls for the exercise of this Court's jurisdiction.

Respondents cite Justice O'Connor's concurrence in *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440, 2455 (1995), for the proposition that "the knowledge attributed to the reasonable observer [cannot] be limited to the information gleaned simply from viewing the challenged display." The quotation does not help Respondents.

First, to read Justice O'Connor in *Pinette* as insisting on a focus broader than the symbol and its immediate environs in assessing whether a symbol is religious is to create a contradiction between her opinion in *Allegheny County*, 492 U.S. at 625-27, and her opinion in *Pinette*, a contradiction Justice O'Connor herself did not see.

Second, the issue in *Pinette* was not whether the cross was a religious symbol, but whether private use of the area around the Capitol for religious speech constituted official endorsement of religion. A majority of the Court thought that the answer to that

question turned on whether access was generally available, and that required a broader inquiry than just a glance at the religious symbol. On the question of whether the cross was a religious symbol, a majority of the justices stated that because the cross stood alone, it was plainly a religious symbol, notwithstanding all the other symbols displayed in the Square.

Justice O'Connor herself noted that the fact that the cross stood unattended at the seat of government "arguabl[y] intimat[ed] government approval," *id.* at 2453; a view shared by Justice Souter (for himself, Justice Breyer and Justice O'Connor). "[D]isplay of the cross alone could not reasonably be taken to have any secular point.") *Id.* at 2461. Justice Stevens thought this private religious display unconstitutional, because "we should be mindful of the power of a symbol standing alone and unexplained." *Id.* at 2466. Justice Ginsberg expressed a similar view. *Id.* at 2474-75. Nothing in *Pinette*, then, is in any way inconsistent with *Allegheny County*'s focus on the displayed symbol and its immediate physical environs when the question is whether a symbol is understood to convey a religious message.

II
THIS COURT SHOULD PASS ON THE QUESTION OF STANDING

Respondents dismiss Petitioner's standing argument as if it were one about some technical doctrine which could be barred by laches. But Petitioner did not suggest a mere technical problem. The Petition explained why Petitioner may have lacked standing in the court below,[1] and why, therefore, the court below may have been without constitutional power to decide this case.

The issue was not held in reserve, as Respondents charge. Petitioner promptly notified the Second Circuit of her new address. Although that notification, in retrospect, might have been written more crisply it suffices to absolve Elewski of Respondents' charge that she is manipulating the judicial system. Elewski's letter was sent to counsel for the Respondents, who made no effort to suggest

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1. See, *Lyons v. City of Los Angeles*, 461 U.S. 95 (1983) (where claim for injunctive relief is moot as to plaintiff, plaintiff lacks standing to pursue legal issue and court has no power under Article III to determine cause).

that the case was moot, perhaps because Syracuse was reluctant to give up its victory in the District Court.

Respectfully submitted,

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